

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2007 Session

MICHAEL H. CAMMON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Rutherford County
No. 53884 James K. Clayton, Jr., Judge

No. M2006-01823-CCA-R3-PC - Filed August 23, 2007

The petitioner, Michael H. Cammon, appeals the post-conviction court's denial of relief. He contends that he received ineffective assistance from both trial and appellate counsel. He further contends that the rulings of the post-conviction court were not timely and violated the Post-Conviction Procedure Act because the court did not issue written findings of fact and conclusions of law. After review, we affirm the judgment from the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

W. H. (Steve) Stephenson, II, Nashville, Tennessee (on appeal), and Howard M. Romaine, Murfreesboro, Tennessee (at trial), for the appellant, Michael H. Cammon.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; William C. Whitesell, Jr., District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted of robbery, aggravated assault, felony possession of a weapon, and possession of more than 300 grams of cocaine with the intent to sell or deliver. This court affirmed all the convictions except for the aggravated assault, which was remanded for a new trial. See State v. Michael Cammon, M2001-00592-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 895, *2, (Tenn. Crim. App. Oct. 25, 2002, at Nashville). This court's opinion on direct appeal summarized the facts presented at trial as follows:

On February 17, 1998, Rutherford County Deputy Gregory Tillman stopped a late 1980's model Chevrolet Caprice on Interstate 24 near Murfreesboro. Tillman stopped the car because it did not have its headlights on during inclement weather.

The appellant, Michael Cammon, was driving the car while the owner, Antonio McCray was a passenger. Tillman asked the appellant to sit in the back seat of the patrol cruiser while he wrote a ticket for the traffic offense. McCray remained in his vehicle.

As he had stopped the car, Tillman had noticed that the occupants appeared to be hiding something. In addition, the appellant had initially said he had just brought [sic] the car, but then changed his story and said the car belonged to McCray. As a result of this suspicious behavior, Tillman asked the appellant if he was carrying any illegal drugs and also if the officer could search the car. The appellant denied there were any drugs in the car and he refused to consent to a search. Tillman told the appellant a drug dog was in route to the scene and then the officer exited the car to ask if McCray would consent to the search.

Tillman returned to the patrol car with McCray. As the deputy opened the back door of the patrol car, the appellant jumped out and grabbed for Tillman's pistol. During the struggle, the weapon discharged. Eventually, Tillman let go of the gun, pushed the appellant away and ran across the interstate. Looking back, he saw McCray get into his vehicle and flee while the appellant stood on the side of the road with Tillman's pistol.

After fleeing the scene, McCray exited the interstate a short distance away. He grabbed the weapons that both he and the appellant had been carrying along with a quantity of cocaine that the appellant had purchased in Atlanta and threw the items into a fenced area housing a trash dumpster.

McCray then hid in a hotel that was closed for remodeling. Eventually, the police found the two pistols and two bundles of cocaine near the dumpster where McCray had been seen disposing of the contraband. One bundle of cocaine weighed 250.5 grams, and the second one weighed 250.3 grams.

Ultimately, both the appellant and McCray were apprehended. McCray testified for the prosecution at the appellant's trial.

2002 Tenn. Crim. App. LEXIS 895, at **2-4.

During the post-conviction hearing, both trial and appellate counsel testified as to their representation of the petitioner. Appellate counsel testified first and said that he was hired to represent the petitioner on appeal. He recalled that the legality of the traffic stop was an issue in the case at trial but that he did not appeal the legality of the stop.

On cross-examination, appellate counsel testified that he had practiced criminal law approximately twenty-five years. He viewed the traffic stop as separate from the suppression issue because the drugs were seized from a co-defendant some time after the traffic stop. He did not feel

that the legality of the traffic stop would necessarily have anything to do with the suppression of the cocaine. Appellate counsel testified he had appellate experience with more than seventy-five suppression issues to this court. Further, he said he had practiced before this court on more than 150 occasions and also had twenty-five federal appeals. He said his recollection was that no evidence was recovered from the vehicle during the stop but that the drugs were later recovered from a garbage dumpster.

Appellate counsel testified that, because nothing was seized from the vehicle pursuant to the stop, there would be nothing to suppress if, in fact, the traffic stop had been illegal. He was of the opinion that the issue would have been a frivolous claim to this court. However, he said he would have filed the motion to suppress at the trial level, as did trial counsel, because, “[i]f nothing else, for the discovery benefits.” He said it was his practice to file a motion to suppress in almost every case where someone has been restrained. He appealed the issue of corroboration because he felt it was the petitioner’s best chance for success. In hindsight, appellate counsel did not think he should have raised the alleged illegal stop on appeal.

Next, trial counsel testified that this was his third post-conviction proceeding in thirty-nine years of practicing law. He said he was retained by the petitioner for trial. He recalled that the petitioner told him he was in Murfreesboro on the day of the incident because he was looking at a job site. He said that the petitioner and his co-defendant stopped to eat, purchased beer, and began the drive back to Nashville when they were stopped. The petitioner told counsel that he had been drinking that day and was afraid he would receive a D.U.I. Trial counsel testified that it was the petitioner’s decision not to testify. Counsel stated that, although he did not recall informing the petitioner of his right to testify at the suppression hearing, it was unlikely that he failed to tell him.

Trial counsel testified that he filed a standard discovery motion and the motion to suppress. He recalled that the motion to suppress was heard on the morning of trial. He had no independent recollection of whether he filed additional motions. He said that he did not hire an expert to weigh the drugs prior to trial but testified that he saw the drugs and knew they weighed more than half a gram. Trial counsel, when questioned about the possibility of the drugs being planted, testified that he had no reason to doubt that the co-defendants were responsible for the drugs.

On cross-examination, trial counsel testified that, in this case, the suppression had to do with the stop of the vehicle. He said that the petitioner never divulged to him any evidence to show that he was not guilty of possessing the drugs in this case, but the petitioner told counsel that he knew nothing about the drugs. He indicated that he cross-examined a witness at trial regarding the lack of fingerprints on the evidence. Trial counsel testified that he did not advise the petitioner to refuse to testify.

The petitioner testified that he hired trial counsel after the public defender’s office was appointed to represent him. He said that trial counsel gave him the impression that the State would not seek to go to trial. He recalled that trial counsel offered for him to plead to the same deal as his co-defendant but that he did not have permission to do so at the time. The petitioner said that he met

with trial counsel approximately five times between the time counsel was hired and the beginning of the trial. He said he told trial counsel that he owned a trucking company and that he was incorporated. According to the petitioner, they did not discuss trial strategy until a week before trial. He said that counsel never said anything to him about his right to testify and that, until the second day of trial, he believed he would testify.

The petitioner believed that the prosecutor at trial engaged in misconduct. He argued that the State offered a deal to his co-defendant in exchange for his testimony, and the petitioner contended that was improper. He further argued that the prosecution allowed a witness to lie on the stand regarding whether the petitioner received a traffic citation after the traffic stop.

On cross-examination, the petitioner testified that he had no knowledge of the public defender filing any discovery motions on his behalf. Upon a showing that the discovery motions had been filed and were in the court record, the petitioner acknowledged that they had been filed. He acknowledged that trial counsel argued a motion for new trial at which he argued that the court should have suppressed the traffic stop. He said that the reason he ran from the officer after the traffic stop was because he had been drinking beer and driving and because he feared getting a D.U.I. The petitioner said he ran because he would rather have an evading arrest on his record than a D.U.I. but acknowledged that he did not know that both offenses were Class A misdemeanors. He also acknowledged that he committed a crime in the officer's presence when he attempted to run.

The petitioner agreed that his co-defendant linked him to the drugs. There was video/audio tape evidence of the altercation between the petitioner and the officer during the traffic stop. Finally, the petitioner admitted that he committed a crime on the date of the traffic stop.

The final witness to testify during the post-conviction hearing was a former co-worker of the petitioner. He testified about the petitioner's former business endeavors related to his trucking enterprise. He also said that he would have been willing to testify at trial on the petitioner's behalf if he had been contacted by the petitioner's trial counsel. On cross-examination, he stated that he did not know if the petitioner was involved in drug trafficking.

The post-conviction court found that the petitioner did not carry his burden of proof that trial counsel was ineffective because he did not call the petitioner to testify at trial. Specifically, the post-conviction court held that it was the petitioner's decision not to testify during the course of his prosecution. The post-conviction court did not address the evidentiary claims raised by the petitioner during the hearing and advised the petitioner to appeal if he disagreed with the court. The petitioner acted upon that advice, and this appeal followed.

Analysis

The petitioner raises five issues on appeal, which the State consolidated into four issues in its brief. We adopt the State's merger of the petitioner's issues I and II and address the following four issues: 1) whether the petitioner had ineffective assistance of either trial and appellate counsel;

2) whether the evidentiary rulings of the post-conviction court are adequate under the Post-Conviction Procedure Act; 3) whether the post-conviction court order dismissing the petition was adequate under the Post-Conviction Procedure Act; and 4) whether the petitioner was entitled to effective assistance during the post-conviction proceeding. We shall address each issue separately.

Since the petitioner alleged ineffective assistance of counsel, it was the petitioner's burden in the post-conviction court to prove the allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). We are required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 463 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). We review the post-conviction court's factual findings underlying a claim of ineffective assistance of counsel under a de novo standard with a presumption that the findings are correct, unless the preponderance of the evidence establishes otherwise. Burns, 6 S.W.3d at 461.

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington. The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The failure to prove either deficiency or prejudice justifies denial of relief; therefore, the court need not address the components in any particular order or even address both if one is insufficient. Goad, 938 S.W.2d at 370.

The test in Tennessee to determine if counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Honeycutt, 54 S.W.3d 762, 769 (Tenn. 2001). Therefore, in order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below and objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S. Ct. At 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The petitioner contends that trial counsel was ineffective because he did not request an instruction on accomplice testimony or an instruction on the amount of cocaine needed for the conviction. He also argues that trial counsel erred by failing to call him to testify during the suppression hearing. The State argues that the record reflects that the post-conviction court properly determined that trial counsel's representation was neither deficient nor prejudicial. After review, we agree.

This court's opinion in the direct appeal of this case concluded that the co-defendant's testimony was sufficiently corroborated. As a result, the defendant cannot demonstrate that he was prejudiced. It is unlikely that the jury instruction the petitioner seeks would have altered the outcome of his trial.

The petitioner also argues that trial counsel was ineffective for failing to request an instruction regarding the amount of the controlled substance. On direct appeal, this court concluded that the absence of the instruction amounted to harmless error. Because the error was deemed to be harmless, the petitioner cannot meet his burden of showing that he was prejudiced. This issue was addressed on direct appeal and, we are therefore precluded from further review.

The petitioner also contends that trial counsel was ineffective for failing to call him as a witness at the suppression hearing. Counsel testified at the post-conviction hearing that he did not call the petitioner to testify because the petitioner would not have been able to offer any evidence regarding the traffic stop or its legality. The petitioner contends that he could have testified to the facts surrounding the stop including, but not limited to, the weather at the time, the manner of his driving, and whether his headlights were engaged. However, he raises this defense for the first time on appeal. He made no mention of the weather or circumstances of the traffic stop during the post-conviction hearing; he only testified as to his actions subsequent to the stop of his person. Since an appellant cannot change theories from the trial court to the appellate court, this issue is waived. State v. Alder, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001); State v. Dooley, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000).

Next, the petitioner contends that appellate counsel rendered ineffective assistance for failing to appeal the denial of the defense motion to suppress. With regard to appellate counsel, it is counsel's responsibility to determine the issues to present on appeal. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986)(citing State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)). This responsibility addresses itself to the professional judgment and sound discretion of appellate counsel. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995). There is no constitutional requirement that every conceivable issue be raised on appeal. Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). The determination of which issues to raise is a tactical or strategic choice. Id. The petitioner offers nothing on appeal to show that appellate counsel was ineffective in his strategy. Counsel testified that he was experienced in criminal appellate practice and that he made a strategic decision not to appeal the suppression issue because he did not believe it would be successful on appeal. The State correctly argues that appellate counsel's judgment, as to which issues would likely prevail on appeal, was sound because he did successfully gain a remand on the

aggravated assault conviction. Our review does not reflect that the petitioner has met his burden of demonstrating either that appellate counsel's performance was deficient or that the petitioner was prejudiced by appellate counsel's representation.

Next, the petitioner argues that the post-conviction court erred in limiting the evidence admitted during the hearing and in failing to adequately address all the issues presented in its findings of fact and conclusions of law. Specifically, the petitioner contends the post-conviction court should have allowed additional questioning regarding the accomplice jury instruction and the suppression hearing. The State argues that the post-conviction court was within its discretion to prevent further discussion of the issues that had been previously determined, pursuant to Tennessee Code Annotated section 40-30-106(h). The petitioner concedes that the issues have been previously addressed by this court but argues that they are still proper issues for post-conviction relief. Our review reflects that the petitioner has provided no citation to any authority in his discussion of the post-conviction court's alleged erroneous evidentiary rulings; therefore, we must deem the issues to be waived pursuant to Tennessee Court of Criminal Appeals Rule 10.

The petitioner also argues that the post-conviction court failed to comply with the requirements of Tennessee Code Annotated section 40-30-111(b) and (d). The State argues that the trial court's order was sufficient to comply with the requirements of the Post-Conviction Procedure Act. Specifically, the State argues that although the judgment did not specifically cite the cases of Strickland v. Washington and Baxter v. Rose, the order was sufficient to comply with the Post-Conviction Procedure Act because it implicitly referenced both the performance and prejudice prongs of those cases in stating that the petitioner did not carry his burden of proof that counsel "was ineffective and that it prejudiced the jury against him."

The post-conviction court is required to set forth written findings of fact and conclusions of law for each claim raised in a post-conviction petition. T.C.A. § 40-30-111(b). Although this requirement is mandatory, reversal is not always warranted when a trial judge fails to include written findings of fact and conclusions of law in the order dismissing a post-conviction petition. State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984). The legislative intent of the statute is to aid the appellate court's review of post-conviction proceedings. Id.; George v. State, 533 S.W.2d 322, 326 (Tenn. Crim. App. 1975). Where the court orally pronounces its findings from the bench, failure to state findings of fact and conclusions of law in the final order may be harmless error. State v. Higgins, 729 S.W.2d 288, 290-91 (Tenn. Crim. App. 1987).

Here, it appears from the record that the court orally pronounced its findings from the bench and reduced the pronouncement to writing in lieu of other written findings of fact or a final order. The petitioner contends that this is insufficient. However, this court has repeatedly concluded that the failure to state findings of fact and conclusions of law in the final order may be harmless when, as in the instant case, the petitioner has failed to demonstrate that he was entitled to relief. See Clyde Dewayne Wesemann v. State, No. E2003-02256-CCA-R3-PC, 2005 Tenn. Crim. App. LEXIS 1, at *8 (Tenn. Crim. App. Jan. 4, 2005, at Knoxville); Ralph Dewayne Moore v. State, No. E2005-01007-CCA-R3-PC, 2005 Tenn. Crim. App. LEXIS 1190, at *8 (Tenn. Crim. App. Nov. 17, 2005,

at Knoxville); James Westbrook v. State, No. W2005-02459-CCA-R3-PC, 2006 Tenn. Crim. App. LEXIS 369, at *9 (Tenn. Crim. App. May 4, 2006, at Jackson). While we do not believe that the underlying judgment is the model upon which future final orders should be based, it is adequate.

The petitioner also argues that the post-conviction court is in violation of the provisions of Tennessee Code Annotated section 40-30-11(d), which requires courts to rule within sixty days of the conclusion of their proof. The State does not address this issue. The petitioner acknowledges that there is case law which states that a violation of the time limit does not, as a matter of law, grant him any relief. He argues that this violation, when considered with his other issues, should amount to a cumulative error to grant him relief. We disagree.

The strict wording of the statute demands that a post-conviction court issue a ruling within sixty days of the conclusion of the presentation of proof. In this case, the hearing was conducted on December 21, 2005, and the pronouncement of judgment on the petition was not returned until August 14, 2006. Clearly, this delay is not in compliance with the intentions of the statute; however, we are not compelled to grant any relief to the petitioner. This court has previously concluded that significant delays between the filing of the post-conviction petition, to the evidentiary hearing, to the date of the conclusion of proof, and to the final order do not entitle the petitioner to post-conviction relief simply for the court's non-compliance with set time limits. See Juan Alfonzo Hill v. State, E2004-02915-CCA-R3-PC, 2005 Tenn. Crim. App. LEXIS 1035, at *23 (Tenn. Crim. App. Sept. 19, 2005, in Knoxville). The petitioner must demonstrate that he was prejudiced by the delay and that he has not offered any evidence of prejudice. Therefore, we conclude that the petitioner is not entitled to relief on this issue.

The petitioner's final issue on appeal is that he did not receive effective assistance of counsel at his post-conviction hearing. However, he correctly acknowledges that he does not have a constitutional right to effective assistance of post-conviction counsel. House v. State, 911 S.W.2d 705, 712 (Tenn. 1995). Because there is no right to effective counsel during a post-conviction proceeding, this issue is without merit.

Conclusion

Based on the foregoing and the record as a whole, we affirm the judgments of the post-conviction court.

JOHN EVERETT WILLIAMS, JUDGE